



RIGHTS STUFF

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Consideration of Arrest and Conviction Records in Employment May Sometimes Constitute Race or National Origin Discrimination

The BHRC often gets calls from people who say they can't get a job because of their criminal history, including arrests and convictions. Other times we get calls from people who say they interviewed for a job, disclosed their criminal history and were hired. But a few days after they started working, the new employer received a copy of the person's criminal history background check and fired them. In some cases, it may be a violation of fair employment laws to refuse to hire people, or to fire people, because of their arrest or conviction records.

The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces federal fair employment laws, notes that "the fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question."

Clearly, if an employer ignores conviction records for white applicants, but refuses to hire African American applicants with similar conviction records, that would be a form of race discrimination. And sometimes a neutral policy - where an employer

refuses to hire anyone with conviction records, regardless of race - may be a form of race discrimination as well, according to the EEOC. That's because neutral criminal record exclusions affect members of minority groups more than they affect white applicants. According to a 2010 study, one in every 87 white males between 18 and 65 is incarcerated; one in 36 similarly-aged Hispanic men is incarcerated and one in 12 African American men is.

The EEOC says that employers will be able to show their policies against hiring people with criminal records are not discriminatory if they can do one of the following:

- validate the policy for the position in question in light of the Uniform Guidelines on Employee Selection Procedures, or
- show that they developed a targeted screen considering at least the nature of the crime, the time elapsed and the nature of the job. Using such a screen, an employer might very reasonably reject an applicant for a bank teller position who was convicted of theft a year earlier, regardless of the applicant's race. Refusing to hire someone to mow lawns because twenty years earlier, she was

(continued on page 3)

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Employer Can't Make Nurse with Asthma Supervise Smoking Breaks

Yvonne Quaynor was employed by Camden Place Health & Rehab, a health and rehabilitation facility in North Carolina, as a certified nursing assistant. She has asthma.

Beginning in 2012, Camden Place required all certified nursing assistants to take turns supervising residents during the residents' scheduled smoking breaks. When Quaynor did this, she found that the secondhand cigarette smoke she inhaled aggravated her asthma. She repeatedly complained, to no avail. After a particularly severe asthma attack, she obtained a note from her doctor saying she should be excused from supervising the smoking breaks. Camden Place denied her request and fired her for refusing to supervise the smokers.

The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to employees with disabilities. The law requires employers to work with employees with disabilities to try to find out if there is a way to accommodate their needs while still meeting business requirements. According to the Equal Employment Opportunity Commission (EEOC), where Quaynor filed her complaint of discrimination in employment on the basis of disability, Camden Place did not try to work with her to come up with a solution.

The EEOC announced a settlement in September, 2013. Under the settlement, Camden Place will pay Quaynor \$51,000, provide training to employees on the

ADA, implement a procedure for requesting accommodations that will incorporate the interactive process and post a copy of its nondiscrimination policy at its facility.

An attorney for the EEOC said, "Employers must be sensitive and reasonable about an employee's complaints about a workplace hazard to their health, and health-related facilities should be especially cognizant of this. We are pleased that Camden Place is taking action to ensure that it fulfills its obligations under the ADA."

If you have questions about the ADA, please contact the BHRC.

Same Sex Marriage Cases Affecting Federal Benefits

The federal Family and Medical Leave Act (FMLA) provides that covered employers have to allow covered employees to take time off (paid or unpaid) to deal with family and medical issues, including a spouse's medical issues. In August, the U.S. Department of Labor (DOL) announced that in accordance with recent Supreme Court decisions on same-sex marriage, it was affirming the availability of spousal leave for same-sex couples under FMLA. The new policy covers only

those 15 states and Washington, D.C. that have legalized same-sex marriage.

On the same day that DOL made its announcement, the Social Security Administration said it would begin processing spouse retirement claims for same-sex marriages and paying out the benefits.

Before the Supreme Court overturned the Defense of

Marriage Act (DOMA), supporters of same-sex marriage rights said that hundreds if not thousands of benefits were available only to opposite sex marriage couples. DOMA kept same-sex couples from receiving those benefits, whether or not their marriage was recognized by their state. It may take a while for the federal government to make all the necessary changes to bring its policies into compliance with the recent Supreme Court decisions.



Conviction Records May Constitute Discrimination

(continued from page 1)

convicted of marijuana possession might be less defensible.

Employers need to follow consistent policies when deciding whom to interview and to hire. If an employer requests a criminal background check on one applicant, he should do the same for all similarly-situated applicants. If an employer gives some applicants rejected because of their criminal records a chance to explain, he should do the same for all similarly-situated applicants.

The EEOC urges employers to do the following:

- Eliminate policies or practices that exclude people from

employment based on any criminal record.

- Train hiring officials and decision makers about laws relating to employment discrimination.

- Develop and follow a narrowly-tailored written policy and procedure for screening applicants and employees for criminal conduct. The process should include the following:

- Identify essential job requirements and the actual circumstances under which the job is performed.

- Determine the specific offenses that may demonstrate unfitness for performing such

jobs, based on all available evidence.

- Determine the duration of exclusions for criminal conduct based on all available evidence.

- Include an individual assessment when making decisions.

- Record the justification for policies and procedures.

- Keep a record of research conducted in crafting policies.

- When asking about criminal records, ask only about records relating to crimes for which exclusion would be job-related.

Is it Unconstitutional to Execute a Convict with Severe Mental Disorders?

Freddie Lee Hall has been on death row in Florida since 1981, when he and another man abducted a woman who was seven months pregnant. They beat, sexually assaulted and killed the woman.

No one questions the fact that Hall has severe mental deficiencies. He's been diagnosed with chronic psychosis and a learning disability that left him functionally illiterate, with a short-term memory equivalent to a six-year-old's.

His IQ has been measured at 71. Florida state law says that anyone with an IQ lower than 70 is mentally deficient and thus exempt from execution based on Supreme Court decisions. The Supreme Court has said that inmates cannot be executed if their mental deficiency is so significant that they are unable to acknowledge the wrongfulness of their conduct.

Hall's attorney argues that the state should determine a range

of IQ scores rather than one particular IQ number when determining if an inmate is exempt from capital punishment based on his mental abilities.

The U.S. Supreme Court has agreed to hear the case next year and will likely issue its decision by June, 2014. (Article based on "Death Penalty: Supreme Court to hear case of mentally deficient Florida man," by Warren Richey, Christian Science Monitor, October 21, 2013.)



BHRC Seeks Award Nominations for Annual Human Rights Award

The Bloomington Human Rights Commission is seeking nominations for its annual Human Rights Award. Nominees should be individuals or groups who have made specific, significant contributions to improving civil rights, human relations or civility in our community.

The BHRC especially welcomes nominations demonstrating success in ensuring rights to equal access to housing, employment or education, in ensuring equal access to community life for people with disabilities and nominations for people or organizations who have

done exemplary work and advocacy in increasing civility and tolerance. Past recipients include Bloomington High School North, Bloomington United, Dick McKaig, the Study Circles Project, Daniel Soto, John Clower, Clarence and Frances Gilliam, the Rev. Ernie Butler, the Council for Community Accessibility, Frank McCloskey, the Bill of Rights Defense Committee, WFHB Radio, Doug Bauder, Lillian Casillas, Helen Harrell, Voices & Visions, New Leaf/New Life, Charlie Dupree and Virginia Hall for their work with Trinity Episcopal Church and Guy Loftman.

The recipient(s) will be honored at a public ceremony. Nominations are due by December 9, 2013. For a nomination form, or for more information, call the Bloomington Human Rights Commission, 349-3429. Or send an e-mail to human.rights@bloomington.in.gov. The nomination form is also available on the City's web page, www.bloomington.in.gov.

BHRC Opposes Proposed State Constitutional Amendment Banning Same Sex Marriage

At its October meeting, the BHRC unanimously approved a resolution in opposition to HJR-6. HJR-6, which has been passed by the Indiana State Legislature once, would amend the state constitution to prohibit same-sex marriage.

State law already prohibits same sex marriage, but some legislators feel that that a constitutional provision is required as well. Any amendment of the state constitution has to be passed by two separate state

legislatures and then approved by the majority of the voters. If the state legislature considers and passes this proposal again in 2014, the issue will be on the ballot for voters to consider in the fall of 2014.

The BHRC resolution says that HJR-6 "could permanently ban all legal protections for same-sex couples and their families and remove existing protections for unmarried Hoosiers." It notes that the Bloomington Human Rights Ordinance

"declares that denying people rights because of their sexual orientation is contrary to the principles of freedom and equal opportunity" and that the BHRC "is committed to marriage equality for all."

The BHRC forwarded its resolution to the Bloomington Common Council, which is considering passing its own resolution in opposition to HJR-6 as well.